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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 135

SAMUEL CAMARATO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 133–141) is reported in 111 F. (2d) 243.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 9, 1940 (R. 142). A petition for rehearing (R. 143–153) was denied by the Circuit Court of Appeals on May 11, 1940 (R. 154). The petition for a writ of certiorari was filed June 8, 1940. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

1. Whether the courts below erred in holding that the petitioner was not justified in refusing to answer certain questions propounded to him as a witness before a grand jury.

2. Whether due process was denied the petitioner in the prosecution of the contempt proceeding.

STATUTE INVOLVED

Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385) provides that:

> The said courts [of the United States] shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehaviour of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror,

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[1] If the Criminal Appeals Rules apply (Cf. *McCrone* v. *United States*, 307 U. S. 61; *United States* v. *Goldman*, 277 U. S. 229), the notice of appeal (R. 101) was filed within the five-day period and the petition for writ of certiorari within the thirty-day period permitted by those rules (Rules III and XI).

witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

Petitioner was subpoenaed as a witness before the United States grand jury sitting at Newark, New Jersey, on September 12, 1939 (R. 2, 89). He refused to answer certain questions put to him, copied below,[2] on the ground that the answers

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[2] (a) "Q. What is the name of your place of business?"

(b) "Q. Did you at one time sell wire service to horse rooms?"

(c) "Q. In 1931, did you have any connection with wire service?"

"A. 1931, no."

"Q. In 1932?"

(d) "Q. You answered it for 1931. What is the objection to answering it for 1932 since you have answered it for 1931?"

(e) "Q. Did you have any connection with wire service in 1933?"

(f) "Q. Did you have any connection with wire service at any time?"

(g) "Q. You get wire service in your horse room, don't you?"

(h) "Q. You never paid for wire service in your horse room, did you?"

(i) "Q. How long have you had a horse room in Atlantic City?"

(j) "Q. What kind of work did Joe Camarato do?"

(k) "Q. Didn't you have a switchboard in Atlantic City through which you delivered wire information to horse rooms?"

(l) "Q. Well, did you at any time supply wire information or any racing information over the wire to any horse rooms in Atlantic City?"

thereto might tend to incriminate him (R. 88–99; see also R. 65–76, 80, 109–110, 135). His refusal to answer was immediately brought to the attention of the District Judge who, on the same day, convened court in the grand jury room where the petitioner appeared with his counsel. Petitioner was there advised by the Assistant United States Attorney that a presentment would be filed against him and, further, was told to appear before the court again on September 19, 1939, for a hearing. The petitioner was also informed that the hearing would be based on the record before the grand jury, a copy of which his counsel procured (R. 4, 8, 134–135).

On September 13, 1939, a presentment (R. 2) was filed with the clerk of the court (R. 1) and a copy thereof mailed to the petitioner's counsel (R. 5, 135). On September 19, 1939, an extensive hearing was held (R. 3–88), at which the petitioner was present with his counsel and was permitted to introduce certain evidence in support of his contention that he was justified in refusing to answer the questions in controversy. This evidence consisted of

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(m) "Q. In 1935 when you met Goodman what business did you have with him?"

"A. I didn't have no business at all with Goodman."

"Q. Did you ever speak to him?"

"A. Yes, I spoke to him."

"Q. Wasn't it business talk that you had with him?"

(n) "Q. Did you have any conversation with Goodman about getting your wire information free in your own horse room?"

two perjury indictments, one rendered against one Joseph Camarato (R. 112–122), petitioner's nephew (R. 95), and the other against one Frank Molinaro (R. 122–131), together with the substance of certain testimony given by one David Fischer at contempt proceedings previously instituted against Joseph Camarato and Frank Molinaro (R. 38).

The District Judge, after hearing arguments both on the law and the facts, proceeded to examine individually each of the questions which the petitioner refused to answer, and determined that there was no justification for his refusal to answer the questions set forth in Footnote 2, *supra*, pp. 3–4. (R. 65–76, 80.) He accordingly held the petitioner to be in contempt (R. 76), but postponed the imposition of sentence for a week in order to give the petitioner opportunity to consult with his counsel and determine whether he desired to purge himself of the contempt by appearing before the grand jury and answering the questions (R. 76, 78). At the expiration of the week the petitioner again appeared with counsel and informed the court that upon counsel's advice he still declined to answer the questions (R. 84). The court then imposed a sentence of six months upon the petitioner (R. 88).

Upon appeal to the Circuit Court of Appeals for the Third Circuit the judgment of conviction was unanimously affirmed (R. 133–142).

ARGUMENT

I

1. It is not clear from the petitioner's argument whether he contends that if he were compelled to answer the questions set forth in Footnote 2, *supra*, pp. 3–4, such answers would have been directly incriminating or whether it is his position that he was justified in refusing to answer these questions because they would constitute "leads" to evidence which would incriminate him. In either event, regardless of whether the constitutional privilege extends to "leads" or whether it is restricted merely to answers that would be directly incriminating, it is clear that "the danger to be apprehended must be real and appreciable." *Mason* v. *United States*, 244 U. S. 362, 365. See also *Brown* v. *Walker*, 161 U. S. 591, 599.

2. The only Federal statute which the petitioner indicates that he was fearful that he might be charged with violating was the income tax law. But it is evident, as was recognized by the Circuit Court of Appeals (R. 138), that there is nothing on the face of the questions propounded which would in any way indicate that answers to them would establish an infringement of that law.

The petitioner insists, however, that the evidence he introduced at the contempt hearing made it apparent that if he answered the questions such answers would constitute proof of petitioner's income and thus would have placed him in danger of prosecution for income tax violation.

Thus the petitioner emphasizes the testimony of David Fischer, given at contempt proceedings instituted against Joseph Camarato and Frank Molinaro (R. 38), that once each week Fischer paid to Joseph Camarato $200, of which $40 was for wire service and $160 for an undisclosed purpose. But there is no basis in the present record for linking Joseph Camarato with the petitioner in these transactions. Petitioner argues that if he had testified that he sold wire service to "horse rooms" the Government would then have had evidence which, coupled with Fischer's testimony, would show that the petitioner received not only $40 a week for the wire service but also $160 a week for an undisclosed purpose. Such argument might have substance if it had been shown that petitioner was the only one in Atlantic City furnishing wire service to "horse rooms." In the absence of such a showing it would be far-fetched indeed to say that petitioner's acknowledgment that he was engaged in furnishing wire service to "horse rooms" would constitute an admission that *he* was the one who had received these weekly payments from Fischer through Joseph Camarato. Moreover, there is involved in the petitioner's argument the further assumption that if he had received these weekly payments he had failed to account for them in his income-tax returns and that he had made it evident to the court that he had not included such amounts in his returns.

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Petitioner further stresses the two perjury indictments returned against Joseph Camarato and Frank Molinaro which he introduced in evidence. Beyond the fact that it is apparent from those indictments (R. 112–131) that the grand jury was investigating possible income-tax violations by operators of illegal enterprises at Atlantic City, a fact not in dispute, the most that the indictments disclosed was that the grand jury knew that Joseph Camarato and Frank Molinaro were collecting from Fischer and one Kanowitz ("horse room" operators) monies due to the petitioner from Fischer and Kanowitz *for bets* made by them on horse races—information of no consequence since petitioner concedes that he was a bookmaker and gambler (Pet. 3). So far as these indictments refer to any *weekly payments* collected by Camarato and Molinaro from Fischer and Kanowitz and other "horse room" proprietors (R. 121), they are barren of anything which indicates that the grand jury knew for whom these collections were made. It is therefore apparent that these indictments added nothing to Fischer's testimony, which, as we have shown, did not disclose that petitioner was the recipient of the weekly payments which Fischer made.

This leaves the petitioner with the bare contention that if he had answered the questions which sought to determine whether he was connected with the furnishing of wire service to "horse room" proprietors, the Government would next have

pressed questions relating to his income. But, as we have heretofore indicated, the danger which will excuse a witness from testifying must be a real and pressing one—not a fanciful or supposititious fear. As was said by Judge (later Chief Justice) Taft in *Ex parte Irvine*, 74 Fed. 954, 960 (C. C. S. D. Ohio):

> It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.

No such substantial showing has been made in the present case. The petitioner's fears were based, at best, on rumor and hearsay. The prosecutor several times assured the court that the grand jury's investigation was not directed toward ascertaining the petitioner's income (R. 57, 70, 88) and there is nothing in the record to contradict the implication of the prosecutor that the real aim of the inquiry was to seek out income tax violations

of others. At most his answers to the questions propounded might have disclosed a violation of state law, a subject not within the ambit of the constitutional protection. *United States* v. *Murdock*, 284 U. S. 141.

Finally, it should be remembered that responsibility under the statute for determining whether the testimony sought to be elicited would be incriminating is placed primarily upon the judge before whom the question arises.[3] As was said by this Court in *Mason* v. *United States*, 244 U. S. 362, 366, the trial judge is ordinarily—

> in much better position to appreciate the essential facts than an appellate court * * * and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject.[4] Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

Since the petitioner has not made any substantial showing that the trial court abused its discretion in directing him to answer the questions pro-

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[3] As was said in the *Irvine* case, *supra* (74 Fed. at 960): "The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime."

[4] The difficulties inherent in securing to the United States the testimony of its citizens and, at the same time, preserving their right against self-incrimination, are commented upon by Chief Justice Marshall in *In re Willie*, 25 Fed. Cas. 38, 39–40 (C. C. D. Va.).

pounded, there is no basis for invoking the principle to which the petitioner refers, that in a doubtful case weight should be given to the assurance of the witness that he will be incriminated if he answers.

3. The decisions in *United States* v. *Zwillman,* 108 F. (2d) 802 (C. C. A. 2d), and *United States* v. *Weisman,* 111 F. (2d) 260 (C. C. A. 2d), asserted by petitioner (Pet. 8) as being in conflict with the decision below, are sharply distinguishable.

In the *Zwillman* case, the defendant-witness had been engaged in the liquor business during the Prohibition period. A grand jury was investigating violations of the familiar Federal statute forbidding conspiracies to commit any offense against the United States. The defendant-witness was asked to name his "business associates." In reviewing contempt proceedings which arose out of his refusal to answer, the Circuit Court of Appeals held that the defendant-witness was justified in claiming privilege. Obviously, that decision has only the remotest bearing upon the present case. In the circumstances, the naming of his "business associates" would establish a vital link in the proof of a conspiracy involving him. Moreover, the decision in the *Zwillman* case rested also upon the fact that the defendant-witness had been prevented from adducing evidence that might demonstrate that his answers were likely to incriminate him.

In the *Weisman* case it is obvious that, in the light of the surrounding facts, the danger of Weisman's incrimination, if he had answered the questions there involved, was real and substantial. Moreover, as the court pointed out, the defendant in that case was plainly justified in supposing that he was the object of the pursuit by the District Attorney.

II

Petitioner's final contention is that the procedure followed in the contempt proceeding denied him due process. His position is, apparently, that the presentment did not indicate whether the proceeding was coercive and remedial or punitive, that it did not properly advise him of his misbehavior, and that a rule or other process should have issued requiring him to appear and show cause.

The power summarily to punish for contempt extends to misbehavior in the presence of the court "or so near thereto as to obstruct the administration of justice." Judicial Code, Section 268 (*supra*, p. 2); *Savin, Petitioner,* 131 U. S. 267, 276. In that case (p. 277) this Court said that "within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court." In *United States* v. *Dachis,* 36 F. (2d) 601, 602 (S. D. N. Y.), it was stated that the "grand jury is an appendage of the court, and

proceedings before it are regarded as being in the presence of the court." Of course, however, where, as here, the misbehavior occurred in the grand jury room, the misbehavior is not under the eye or within the view of the court and hence not "in open court," with the result that the judge cannot forthwith mete out punishment wholly upon his own knowledge. However, even where the contempt is not committed in open court but is nevertheless within the presence of the court, it is only necessary that the recalcitrant witness be advised of the charge against him and have an opportunity to present his defense by testimony and argument. In *Cooke* v. *United States,* 267 U. S. 517, the requirements of due process in such a case were thus stated (pp. 536, 537):

> The exact form of the procedure in the prosecution of such contempts is not important. * * *
>
> Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

It is not disputed that the petitioner in the present case had the assistance of counsel at the contempt proceeding and full opportunity to present testimony in his behalf.

There is clearly no merit in his contention that he was not advised that he was being proceeded against for a criminal contempt. The contempt proceeding arose out of a grand jury inquiry into alleged violations of the income tax laws and not out of civil litigation. The presentment was entitled "In re: Samuel Camarato" (R. 2), which is a proper title where the proceeding is for criminal contempt. It is also apparent from the proceeding as a whole that petitioner could not have been in doubt that its purpose was to vindicate the authority of the court and that it was not instituted as an aid to private litigation. Cf. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 446.

There is also no basis for the contention that petitioner was not adequately informed of the charges against him. The record discloses that after he was subpoenaed to appear as a witness before the grand jury and prior to his appearance, he had consulted with counsel and was prepared to claim protection against self-incrimination (R. 92–93); that upon his appearance before the grand jury on September 12, 1939, and his refusal to answer various questions the matter was immediately brought to the attention of the District

Judge, who convened court in the grand jury room; that petitioner was then present with his counsel and was orally advised by an Assistant United States Attorney, acting in behalf of the grand jury, that a presentment would be filed against him, and that such proceeding would be based upon the record before the grand jury; that he was told to appear before the court again on September 19, 1939 (R. 9, 134–135); that on September 13, 1939, the United States Attorney filed a written presentment (R. 2) with the clerk of the court (R. 1);[5] that this presentment stated that it was made by the United States Attorney "pursuant to and in accordance with the directions and instructions of the Grand Jury" and that the proceeding was to be predicated upon "the record" before the grand jury; that petitioner's counsel received a copy of the presentment (R. 5); that, pursuant to authorization by the court, petitioner's counsel obtained a copy of the record before the grand jury (R. 8), which record contained the petitioner's testimony before the grand jury and set forth the questions which he had refused to answer (R. 89–99); that on September 19, 1939, the

[5] It would seem that even an oral presentment by the grand jury would have been sufficient. *Wilson* v. *United States*, 221 U. S. 361, 371. In *Loubriel* v. *United States*, 9 F. (2d) 807 (C. C. A. 2d) a certificate by the grand jury as to the facts was regarded as adequate.

day of the hearing, petitioner appeared with counsel before the District Judge (R. 3); that after extensive argument upon the law and the facts and the introduction of evidence by the petitioner (R. 3–64), the District Judge proceeded to examine each of the questions which petitioner had refused to answer (R. 65–76, 80), with the consequence that the petitioner was not in any way misled as to the questions upon which the subsequent adjudication for contempt was based; that petitioner after he had been adjudged in contempt was given a week within which to purge himself (R. 76, 78); and that at the expiration of that week petitioner again appeared with counsel and informed the court that he still declined to answer the questions (R. 84–88). In the light of the foregoing it is evident that the petitioner was fully informed of the charges against him and was given ample opportunity to be heard in his defense.

There was, of course, no occasion to issue a rule or process to show cause in the instant case, as petitioner contends. As has been indicated, petitioner had been in attendance upon the grand jury as a witness pursuant to subpoena. Upon refusing to answer various questions, the matter was brought immediately to the attention of the court and petitioner, his counsel being present, was advised that a presentment against him would be filed, that the proceeding would be based upon the record before the grand jury, and that he should

appear again before the court a week later. He did so appear with counsel and presented his defense. Nothing more could have been accomplished by the issuance of a rule or process to show cause.

Petitioner places reliance upon the fact that this Court granted a writ of certiorari (281 U. S. 716), subsequently dismissed on stipulation, to review the decision of the Circuit Court of Appeals for the Second Circuit in *O'Connell* v. *United States*, 40 F. (2d) 201. He states that the question presented in that case, a contempt proceeding, was whether the defendant had been denied procedural due process. However, an examination of the dissenting opinion in the Circuit Court of Appeals and the petition for writ of certiorari in that case indicates that in addition to the due process question there were involved several other questions of considerable importance. It cannot be determined, therefore, which of these questions was the one which primarily motivated this Court in granting certiorari. Moreover, it is apparent from the petition for writ of certiorari that the procedural defect principally complained of in that case was that the petitioner had never been informed of the precise basis of the accusation against him. That clearly is not the situation in the instant case.

CONCLUSION

The case was correctly decided below. There is presented no important question of Federal law, and there is involved no real conflict of decisions.

We therefore respectfully submit that the petition for writ of certiorari should be denied.

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JULY 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940